Supreme Court, U.S.
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No. 10-127

IN THE

Supreme Court of the United States

IRANDOKHT BAHRAMI,

Petitioner,

- against -

MOHAMMAD ALI SAADAT KETABCHI,
a.k.a. MOHAMMAD SAADAT KETABCHI,
a.k.a. MOHAMMAD KETABCHI,
a.k.a. HOMAYOUN SAADAT KETABCHI,
a.k.a. HAMAYOUN KETABCHI,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Petitioner demonstrate that the Findings and Conclusions of the District Court were "clearly erroneous"?

2. Did the Petitioner demonstrate by "clear and convincing" evidence any fraud by the Respondent on her post-appeal motion pursuant to Fed.R.Civ.P. 60(b)(3) to vacate the Judgment of the District Court which was denied by the District Court?

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STATEMENT OF THE CASE

The Petitioner brought a civil action against the Respondent and sought monetary damages of Eight Million Dollars based upon an allegation that he raped her on January 28, 2005. The Petitioner was represented by two sets of seasoned attorneys from the inception of that action in the District Court[1], who conducted extensive discovery and appeared for her throughout the trial until Judgment was entered. The Petitioner did not prevail and Judgment was entered in favor of the Respondent. She filed and prosecuted an appeal *Pro Se* in the Second Circuit Court of Appeals, which affirmed the Judgment of the Lower Court.

The Petitioner thereupon moved pursuant to Fed.R.Civ.P. 60(b)(3) to vacate the Judgment of the District Court based upon allegations of fraud, misconduct and misrepresentation. That motion was denied.

The Petitioner has now sought Certiorari in this Court.

This is a diversity case.

After the Respondent severed a sixteen year relationship with the Petitioner, he was charged in the original Complaint with having raped her on January 28, 2005. The Respondent's Answer denied the allegations, since their sexual relationship was always consensual throughout their 16 year relationship.

During discovery, the Petitioner became aware that the Respondent was in Dubai on January 28, 2005. When this was brought to the Petitioner's attention, she testified no less than six times in her

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[1] Southern District of New York.

deposition that the date of the alleged rape was January 27, 2005. Her two daughters also signed statements that the alleged rape took place on January 27, 2005.

In the course of discovery, and after Petitioner's counsel examined the Respondent's passport, it was learned from his airplane ticket that on January 27, 2005, the Respondent was in transit en route to Dubai and that his flight had stopped in Frankfurt, Germany on that date. Shortly before the trial, by application to the District Judge, the Petitioner requested and was granted leave to amend the date in her Complaint, for the second time, that the alleged rape took place on January 25, 2005.

The changes in the dates of the alleged rape were followed in a similar fashion by the Petitioner's two daughters who, back in December 2005, signed statements, at the request of Petitioner's attorney, which attested that the rape took place on January 27, 2005. The two daughters disaffirmed these statements on the eve of trial and submitted new sworn statements, prepared by their mother's new counsel, that the date of the alleged rape of their mother was January 25, 2005.

At the trial, the Petitioner was confronted on cross-examination with her cell phone records. They showed that her cell phone was used to call the Respondent's home in New Jersey at 5:25 P.M. on January 25, 2005, for a 14 minute conversation. This was in direct conflict with the Petitioner's testimony that she was raped at 5:00 P.M. on that very same day in her apartment in Manhattan. She claimed that the Respondent was with her continuously, *all that day and part of the night*, from early morning until around midnight, and that at 9:00 P.M., she, her two

daughters and the Respondent had dinner together at her apartment.

During cross-examination, the Petitioner was shown her cell phone invoice which confirmed a 14 minute call from her cell phone to the Respondent's home. The Petitioner retorted that it was the Respondent, and not her, who used her cell phone to call his house to speak to his daughter during that call at 5:25 P.M. on January 25, 2005. In addition, there were multiple telephone calls to the Respondent on the Petitioner's cell phone bills, as well as to her children, which the Petitioner claimed were all made by the Respondent, who used her telephone.

This is contrasted by the Respondent's testimony on re-direct examination in which he confirmed that between 8:41 A.M. and 8:41 P.M. on January 25, 2005, there were 35 calls on his cell phone, both incoming and outgoing, with calls to his business, his employees, as well as to and from the Petitioner.[2] One of the calls reflected that the Respondent was in Queens, NY. This documentary evidence completely negated the Petitioner's claim of rape and placed into question the veracity and reliability of her testimony.

The Petitioner also confirmed on cross-examination that after the alleged rape, she never went to a hospital, never sought treatment by a physician, never made a complaint to the police, never swore out a complaint against the Respondent,[3] and never had him arrested. What militates against the Petitioner's allegation of rape is that there was never any rape kit,

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[2] On cross-examination, the Petitioner confirmed her cell phone and land line telephone numbers in 2005.

[3] A month later after she retained counsel, she filed a criminal complaint of "aggravated harassment" for an event that allegedly took place on January 28, 2005.

ripped clothing, cuts, bruises, wounds, photographs, or any evidence to confirm that she was raped. On the contrary, the Petitioner testified she had dinner at her apartment with the Respondent and her two daughters on the night of the alleged rape, a few hours after the alleged 5:00 P.M. rape.

Although the Respondent was traveling in Dubai and elsewhere for approximately three months, the Petitioner never notified the police of any alleged rape until *after* she retained counsel in this action.

At the conclusion of the trial, Proposed Findings of Fact and Conclusions of Law were submitted to the District Judge by the parties, followed by responses from each party to the other's submissions. The District Judge prepared his own Findings and Conclusions, ruled that the Petitioner failed to prove her claims by a preponderance of the evidence and dismissed the Complaint. The Appeal to the Second Circuit Court of Appeals affirmed the Judgment of the District Court.

After the decision of the Circuit Court, the Petitioner moved to vacate the District Court Judgment pursuant to Fed.R.Civ.P. 60(b)(3). That motion was denied.

Thus, the instant Petition for Certiorari.

It is respectfully submitted that the Findings and Conclusions of the District Court were not the result of any "clearly erroneous" mistake. The motion to vacate the Judgment was denied by Order dated May 13, 2010, based upon the failure of the Petitioner to demonstrate by "clear and convincing" evidence the existence of material misrepresentations sufficient to satisfy the standard for relief under Rule 60(b)(3).

The Judgment in favor of the Respondent should remain undisturbed. The denial of the Petitioner's

motion to set aside the Judgment was proper and the Petition for a Writ of Certiorari should be denied.

THE REASONS FOR DENIAL OF THE PETITION FOR WRIT OF CERTIORARI

REASON NO. 1

THE FACTUAL FINDINGS BY THE DISTRICT COURT SHOULD BE AFFIRMED SINCE THE PETITIONER HAS FAILED TO DEMONSTRATE THAT THEY WERE "CLEARLY ERRONEOUS" AS REQUIRED BY Fed.R.Civ.P. 52(a)(6)

On the appellate review of the findings of fact made by the District Court, the Second Circuit was aware of the standards established under Rule 52 of the Federal Rules of Civil Procedure. The applicable portions of Fed.R.Civ.P. 52 are:

> "**(a) Findings and Conclusions.**
>
> **(1) In General.** In an action tried on the facts without a jury or with an advisory jury, the court must find the facts specially and state its conclusions of law separately. The findings and conclusions may be stated on the record after the close of the evidence or may appear in an opinion or a memorandum of decision filed by the court. Judgment must be entered under Rule 58.
>
> **(6) Setting Aside the Findings.** Findings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous, and the reviewing court must give due regard to

> the trial court's opportunity to judge the witnesses' credibility."

These standards were followed meticulously by the District Judge. After the parties submitted their proposed Findings and Conclusions, and their respective oppositions to the other's submissions, the District Judge prepared his own Findings dated February 27, 2009. They were substantiated by multiple references to the record of the trial and exhibits. After a recitation of the proceedings prior to trial, the District Judge made 27 separate Findings of Fact. Each contained references to the Affidavits submitted on behalf of the Petitioner, in lieu of her direct testimony, or, from submissions, or references to exhibits in the trial transcript. There were twelve separate findings of fact, with respect to the Respondent, with extracts quoted from the record, documents, evidence, or Affidavits submitted in lieu of direct testimony.

Based upon the standards of Fed.R.Civ.P. Rule 52(a), the Petitioner had to demonstrate that such findings were clearly erroneous in order to justify a decision to set them aside.

The trial was before the Court without a jury. Rule 52(a)(6) requires that due regard be given to the Trial Judge to assess the credibility of the witnesses who testified before him. The Circuit Court had before it the issue of whether the Findings by the District Court were "clearly erroneous". It affirmed the District Court, which was cognizant of the inconsistent statements by the Petitioner and her daughters, especially with regard to the date of the alleged rape. These inconsistencies were before the District Judge, as the trier of the facts. It was

incumbent upon him to deal with such a conflict in testimony.

The only evidence that an alleged rape took place was from the unsubstantiated and uncorroborated accusation by the Petitioner. There were no eye witnesses. Both of the daughters testified that they were not witnesses to any alleged rape of their mother by the Respondent. There was no documentation to corroborate the accusation of the alleged rape. Whether a rape occurred at all was questionable since the Petitioner telephoned her daughter, Irman Shoughi, on her cell phone, at about the time of the alleged rape and told her she needed to come home for dinner, since the Respondent wanted to have dinner that evening with the family. In fact, the family did have dinner with the Respondent later in the evening of the day of the alleged rape.

The findings of the District Court were consistent with the testimony and documentation presented, from which the District Judge concluded that the Petitioner failed to prove her claims by a preponderance of the evidence.

At no time, for weeks after the alleged incident, did the Petitioner complain that she was raped by the Respondent. When she appeared at the local police precinct a month later, she never accused the Respondent of rape. It was only after the Petitioner retained counsel that she filed a criminal complaint with the police. She did not claim rape, just "aggravated harassment' for an occurrence that allegedly took place on January 28, 2005.

The District Court rejected the testimony of Petitioner's expert witness, Dr. Katz. He submitted an Affidavit in lieu of direct testimony and asserted that the Petitioner experienced "an especially brutal

rape in 2005". In response to a question by the Court, Dr. Katz admitted that he did not know, of his own knowledge, whether or not the Petitioner was raped and that he had no knowledge of any rape, much less a "brutal rape," as he had stated within his Affidavit. In response to a question by the Court, he admitted having made the statement without foundation. Dr. Katz testified that the Petitioner appeared to have post-traumatic stress disorder which could have been the result of her relationship with the Respondent, in addition to, or, apart from, any particular episode with him. Dr. Katz did not examine the Petitioner until some three years following the alleged rape. He had no personal knowledge, nor had he ever seen any of the Petitioner's prior medical records, or even obtained her medical history. Dr. Katz's testimony was of no probative value and was not competent. He was a convenient medical witness available to do the Petitioner's bidding. The District Court was fully justified in giving his testimony little or no credence.

With all that was before the District Court, the Findings made by the District Judge were fully warranted and supported. The Petitioner failed to prove her *prima facie* case by a preponderance of the evidence.

To overturn findings of fact, Anderson v. Bessemer City, North Carolina, 470 U.S. 564, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985) is binding. The applicability of Fed.R.Civ.P. 52(a), and the criteria necessary to set aside findings of fact by a trial judge, were discussed. It recognized that findings shall not be set aside unless "clearly erroneous". When there is evidence to support it, the Appellate Court must find that, on the entire evidence, there is a definite and firm conviction that a mistake has been committed; United States v.

United States Gypsum Co., 333 U.S. 364, 395, 68 S.Ct. 525, 542, 92 L.Ed. 746 (1948). Applying the standard in that action, the Circuit Court could not reverse the findings of the trier of fact even if it would have decided the case differently. The function of the Circuit Court was not to decide factual issues *de novo*, Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 123, 89 S.Ct. 1562, 1576, 23 L.Ed.2d 129 (1969). As long as the account of the evidence by the District Court was plausible, the Court of Appeals could not reverse it, even though it may have been convinced, that had it been sitting as the trier of the fact, it would have construed the evidence differently; Inwood Laboratories, Inc. v. Ives Laboratories, Inc., 456 U.S. 844, 102 S.Ct. 2182, 72 L.Ed.2d 606 (1982); United States v. Yellow Cab Co., 338 U.S. 338, 342, 70 S.Ct. 177, 179, 94 L.Ed. 150 (1949); (Where there are two permissible views of the evidence, the factfinder's choice between them cannot be second-guessed).

The established rule is that special deference is to be paid to credibility determination by the trial judge, since the trial judge is in a position to best determine the veracity of the witnesses. This is the major role exercised by the trial judge, whose determinations should not be disturbed on an appellate review unless such a decision is clearly erroneous. Factual findings under the "clearly erroneous" standard - with its deference to the trier of fact - is the rule, not the exception; Anderson v. Bessemer City, *supra.*, at 575 of 470 U.S.; Wainwright v. Witt, 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985); (Only the trial judge can be aware of the variations in demeanor and tone of voice that bear heavily on the understanding of the listener and belief in what has been testified to). When a trial judge's Finding is based on his decision

to credit the testimony of two or more witnesses, each of whom has told a coherent and facially plausible story that is not contradicted by extensive evidence, that finding, if not internally inconsistent, can virtually never be clear error; Orvis v. Higgins, 180 F.2d 537 (2d Cir. 1950); C.F. United States v. Aluminum Co. Of America, 148 F.2d 416, 433 (2d Cir. 1945).

These same standards were applied by this Court in Amadeo v. Zant, 486 U.S. 214, 108 S.Ct. 1771, 100 L.Ed.2d 249 (1988). In a reversal of a Court of Appeals decision, which reversed a decision of the District Court, this Court in overruling the Eleventh Circuit stated, at page 223 of 486 U.S.:

> "It is well settled, however, that a federal appellate court may set aside a trial court's findings of fact only if they are 'clearly erroneous,' and that it must give 'due regard . . . to the opportunity of the trial court to judge of the credibility of the witnesses.'"
>
> ". . . We have stressed that the clearly-erroneous standard of review is a deferential one, explaining that '[i]f the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently.'" (citing Anderson v. City of Bessemer City, *supra.*, at 573-574 of 470 U.S.)

In the action at bar, the District Judge annotated each of his findings of fact with references to either sworn testimony or documentary evidence. While he was aware of the gross inconsistencies in the testimony of the Petitioner and her two daughters, it was obvious that the Findings and Conclusions were based upon a careful analysis of the evidence and testimony, giving the Petitioner the benefit of every doubt. With the complete lack of any documentation or corroboration that an alleged rape actually took place, the District Judge could only draw one conclusion. It was that the Petitioner failed to prove by a preponderance of the evidence that any rape had ever taken place. Without any extrinsic substantiation, or documentation, the District Court was justified in its conclusion that there was a failure of proof on the part of the Petitioner. Since the Petitioner went to the police, why did she not charge the Respondent with rape? The Petitioner claimed she was raped and the victim of violent conduct, but, there was no medical treatment, or any evidence of any alleged violence. There was no rape kit, no photographs or doctor's records. A rape victim would immediately call the police and an ambulance and would be immediately treated at a hospital, or by a physician. Here, there was no such visit, treatment or communication to a physician, hospital or the police! It is a logical conclusion that the Findings of Fact by the District Judge were justified, which gave rise to the determination that there was a failure of proof.

It is respectfully suggested that the admonition within the opinion in United States v. United States Gypsum Co., *supra.*, that unless an appellate court is left with the "definite and firm conviction that a

mistake has been committed," it must accept the trial court's Finding out of deference due the Trial Judge. There is no reason otherwise to disturb the Findings of the District Judge; Inwood Laboratories, Inc. v. Ives Laboratories, Inc., *supra*, 456 U.S. 844; Pullman-Standard v. Swint, 456 U.S. 273, 102 S.Ct. 1781, 1782, L.Ed.2d 66 (1982); Zenith Radio Corp. v. Hazeltine Research, Inc., *supra*, at 395 U.S. 100.

These same standards have been religiously and consistently followed in prior decisions from the Circuit Court, as in Ceraso v. Motiva Enterprises, LLC, 326 F.3d 303 (2003), where it relied upon, and cited decisions from this Court. In its citations to cases, the Circuit Court stated, at page 317, of 326 F.3d:

> "The district court's findings of fact after a bench trial are not to be overturned unless they are clearly erroneous. *See, e.g., Fed.R.Civ.P. 52(a); Anderson v. Bessemer City, 470 U.S. 564, 573-74, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985)*. This standard applies whether those findings are based on witness testimony, or on documentary evidence, or on inferences from other facts. *See, e.g., id. at 574, 105 S.Ct. 1504, Petereit v. S.B. Thomas, Inc., 63 F.3d 1169, 1176 (2d Cir. 1995)*. In reviewing findings for clear error, we are not allowed to second-guess either the trial court's credibility assessments or its choice between permissible competing inferences. *See, e.g., Anderson v. Bessemer City, 470 U.S. 564 at 573-74, 105 S.Ct. 1504*. Even if the

> Appellate Court might have weighed the evidence differently, it may not overturn findings that are not clearly erroneous. *See, id. at 574, 105 S.Ct. 1504.*"

Applying these principles to the District Court's Findings, this Court must conclude that the Findings were based upon the inconsistencies in the testimony of the Petitioner and her daughters, the lack of any corroboration, documentation, evidence, or action on the part of the Petitioner that confirmed that she had been raped. In addition, the phone records belied the truthfulness of Petitioner's allegations of rape. The only reasonable approach on this request for Certiorari is to deny the Petition.

In the action at bar, the Petitioner has not presented any evidence to support her request for Certiorari. The recriminatory statements which accused the Respondent of abusive conduct over a sixteen year period, of the Petitioner having been raped in New Jersey fifteen years earlier, of a claim that the Respondent never paid $80,000 to her, which she alleged was owed by him, and claims that the Respondent, his counsel, Dr. Shaw and Dr. Berger submitted forged documents to the District and Circuit Courts, were unsupported. Accusations by the Petitioner that the Respondent raped a fourteen year old while traveling on his brother's passport, of having laundered money, cheated on taxes, committed forgery, and against Dr. Berger that he changed her test answers, were all unsupported. They reflect anger and an emotional reaction towards the Respondent, rather than relevant factual statements to support Petitioner's arguments. It is manifest that

the Petitioner is not dealing with her anger in a rational manner. None of these accusations were substantiated, and thus were rejected by the District Judge and the Circuit Court. It is respectfully suggested that this Court should disregard such recriminatory accusations. They do not rise to the level of constituting credible evidence. The Petitioner has utterly failed to furnish any clear and convincing evidence to warrant the grant of Certiorari.

Even if this Honorable Court were to disagree with the findings of the District and Circuit Court Judges, under the standards promulgated pursuant to Fed.R.Civ.P. 52(a), unless a determination is made that the findings and conclusions were "clearly erroneous" they must be affirmed; Lopreski v. Terwilliger, 126 F.3d. 34, 38 (2d Cir. 1997). These standards of review have many precedents; Amadeo v. Zant, 486 U.S. 214, 108 S. Ct. 1771, 100 L. Ed.2d 249 (1988); Anderson v. Bessemer City, 470 U.S. 564, 573-576, 105 S. Ct. 1504, 1511-1512, 84 L. Ed.2d 518 (1985); Rogers v. Lodge, 458 U.S. 613, 102 S. Ct. 3272, 73 L. Ed.2d 1012 (1982); Pullman-Standard v. Swint, 456 U.S.273, 102 S. Ct. 1781, 72 L. Ed.2d 66 (1982); Berenyi v. District Director, 385 U.S. 630, 87 S. Ct. 666, 17 L. Ed.2d 656 (1966).

The issues on the appeal to the Circuit Court incorporated within the Petitioner's brief do not rise to the level of having demonstrated any "clearly erroneous" determinations by the District Court. The Petitioner was unable to prove by the preponderance of the evidence that she had a *prima facie* case of an alleged rape that took place on January 28, 2005, or January 27, 2005, or January 25, 2005. The determination of whether the Petitioner presented a *prima facie* case fell upon the District Judge. The

Petitioner was amply represented at the trial by two seasoned attorneys, who, despite their experience and reputation, were unable to present any more than they had available to try to reach the level of a preponderance of the evidence. There never was any! The Petitioner was unable to prove a *prima facie* case and has furnished no legal justification for disturbing the determination made by the District Court or the affirmance by the Circuit Court.

Based upon the foregoing, the Petition for Certiorari should be denied.

REASON NO. 2

PETITIONER FAILED TO MEET THE CRITERIA OF "CLEAR AND CONVINCING EVIDENCE" TO WARRANT VACATING THE JUDGMENT PURSUANT TO Fed.R.Civ.P. 60(b)(3)

Having failed to establish her claim at the trial, the Petitioner's Amended Complaint, which sought Eight Million Dollars based upon allegations that she was raped by the Respondent, was dismissed. Judgment was entered in favor of the Respondent. The Second Circuit affirmed the dismissal. Statements were made that the Respondent committed a fraud upon the Court and that both the Respondent and Jack S. Dweck, as his counsel, compounded the fraud by the submission of forged documents at the trial. The Circuit Court stated that if the Petitioner chose to, she could move under Fed.R.Civ.P. 60(b) to vacate the Judgment. That motion was presented to the District Court following

the affirmance by the Circuit Court and was denied. The Petitioner again failed to meet the prerequisites necessary to obtain such relief.

It appears from the Petition for Certiorari that the Petitioner has argued that the District Judge has committed error by the denial of her 60(b) motion and that she seeks a review by this Court of such denial. It is respectfully submitted that the Petitioner is not entitled to any review since the standards for relief from a final Judgment have not been met. The movant must establish fraud by clear and convincing evidence; King v.First American Investigations, Inc., 287 F.3d 91 (2nd Cir., 2002), cert. den. 537 U.S.960, 123 S.Ct. 393, 154 L.Ed.2d 314 (2002); rehearing den. 537 U.S. 1098, 123 S.Ct. 717, 154 L.Ed.2d 651 (2002); Madonna v. United States, 878 F.2d 62, 65 (2d Cir., 1989).

A similar holding is Anderson v. Cryovac Inc., 862 F.2d 910 (1st Cir., 1988), cert. den. 498 U.S. 891, 111 S. Ct. 233, 112 L.Ed.2d 193 (1990), where it was stated that "the moving party must demonstrate misconduct – like fraud or misrepresentation – by clear and convincing evidence, and must show that the misconduct foreclosed full and fair preparation or prosecution of its case...", citing In re M/V Peacock, 809 F.2d 1403, 1404-5 (9th Cir. 1987); Stridiron v. Stridiron, 698 F.2d 204, 207 (3rd Cir., 1983); Square Construction Co. v. Washington Metropolitan Area Transit Authority, 657 F.2d 68, 71 (4th Cir., 1981); Rozier v. Ford Motor Co., 573 F.2d 1332, 1339 (5th Cir., 1978).

In the action at bar, the Petitioner's attorneys conducted very extensive discovery and represented her at the trial. The District Judge was very liberal in allowing the Petitioner great latitude in the

presentation of her evidence. He permitted two amendments (over objections) by the Petitioner to change the date of the alleged rape from January 28, 2005, as pleaded in the original Complaint, to January 27, 2005 in the Amended Complaint, to January 25, 2005, by oral request, on the eve of trial. At the trial, both the Petitioner and her two daughters disavowed their previously sworn statements and testimony as to the date of the alleged incident. Then, in their direct testimony submissions at the trial, the District Judge allowed them to testify that the alleged rape took place on the day before the Respondent left for Dubai, whatever that date might have been.

The District Court had before it the evidence that the Petitioner never reported to the Police that the Respondent had allegedly raped her. She only reported harassment.

The Petitioner did not proffer any newly discovered evidence to the District Court. The same arguments which she presented to the District Court at the trial, were made by her to the Circuit Court. She then submitted the same material to the District Court in her Rule 60(b)(3) motion, to no avail. What she has now offered to this Honorable Court is no different! It is a re-hash of her accusations and recriminations against the Respondent and includes an attack upon counsel as well.

What the Petitioner seeks in her Petition for Certiorari does not rise to the level necessary to warrant review by this Tribunal. As was stated in the Opinion of the First Circuit in Anderson v. Cryovac, Inc., *supra*, at page 924:

> "Verdicts ought not lightly to be disturbed, so it makes very good sense

> to require complainants to demonstrate convincingly that they have been victimized by an adversary's misconduct."

Unquestionably, the burden of proving fraud and misrepresentation under Fed.R.Civ.P. 60(b)(3) requires that the evidence be clear and convincing; Brown v. Pennsylvania Railroad Company, 282 F.2d 522 (3rd Cir., 1960) cert. den. 365 U.S. 818, 81 S. Ct. 690, 5 L.Ed.2d 696 (1961); Atchison, Topeka & Santa Fe Ry. Co. v.Barrett, 246 F.2d 846 (9th Cir., 1957); Assmann v. Fleming, 159 F.2d 332 (8th Cir., 1947).

The Petitioner has presented no evidence with the instant Petition that was not presented, reviewed and considered by the District Judge at the trial, the Circuit Court on appeal and the District Judge on her motion for relief under Fed.R.Civ.P. 60(b)(3). Naked and unsupported accusations that the Respondent was engaged in money laundering, forgery, use of false passports and the like were unsupported. Claims of misconduct by Dr. Berger in the conduct of psychological tests, and of attorney Dweck having submitted forged documents to the District Court were completely unsubstantiated. They must be disregarded. Under Rule 60(b)(3), the Petitioner was required to present within her motion, ". . . clear and convincing evidence of material misrepresentations," Fleming v. N.Y. University, 865 F.2d 478, 484 (2nd Cir., 1989). To prevail, "a movant must show that the conduct complained of prevented the moving party from fully and fairly presenting his case," State St. Bank & Trust Co. v. Inversiones Errazuriz, Unitada, 374 F.3d 158, 176 (2nd Cir., 2004), cert. den. 543 U.S. 1177, 125 S. Ct. 1309, 161 L.Ed.2d 161 (2005).

Petitioner had a full and fair opportunity to present her case. Whatever evidence she presented did not measure up to a preponderance sufficient to sustain her allegations.

The Petitioner has asserted that the phone bills used on cross-examination by the Defendant were forged. She has failed to present any documentation or evidence sufficient to set aside the Judgment. Merely to argue that a document is a forgery is insufficient as a matter of law! It does not begin to approach the requirement of clear and convincing evidence as mandated by the outstanding precedents. Since the Petitioner had the phone records in her possession (as delivered to her counsel) prior to trial, she had the opportunity to demonstrate any alleged forgery. She failed to do so. Under these circumstances, she has no cause to complain, had no basis to vacate the Judgment of dismissal, and has no basis to impose upon this Court for Certiorari. The rule of law is addressed in Entral Group International, LLC v. 7 Day Cafe & Bar, et al., 298 Fed. Appx. 43 (2nd Cir. 2008).

The Petitioner has failed to set forth any basis that she was unable to have a fair trial. She was not impeded or prevented from presenting any evidence, any witness or any exhibits in the proof of her case. She was not limited in cross-examination of the Respondent or his expert. She had the benefit of an appeal which affirmed the decision and findings of the District Court. She cannot prevail as a matter of law as required by Fed.R.Civ.P. 60(b)(3), predicated on fraud or a fraud on the Court; State St. Bank v. Errazuriz, *supra*, at 176.

The Petitioner has asserted that a fraud on the Court has been engaged in by the Respondent. This is

limited to a charge of fraud which seriously affects the integrity of the normal process of adjudication; Gleason v. Janorucko, 860 F.2d 556, 559 (2nd Cir., 1988); Kupferman v. Counsel Research & Mfg. Corp., 459 F.2d 1072, 1078 (2nd Cir., 1972). (This encompasses a fraud which defiles "the Court or is a fraud perpetrated by officers of the Court so that the judicial machinery cannot perform in the usual manner its impartial task of adjudging cases.")

The Petitioner has not submitted anything in her Petition which demonstrates any false representations of fact or law by the Respondent, or his attorneys. The Petitioner has disputed the evidence at the trial and upon the appeal. This is exactly the type of dispute of "what is expected in the normal adversary process"; Weldon v. United States, 225 F.3d 647 (2nd Cir., 2000). This was discussed in a later decision by the Circuit Court in King v. First American Investigations, 287 F.3d 91 (2nd Cir., 2002), cert. den. 537 U.S. 960, 123 S. Ct. 393, 154 L.Ed.2d 314 (2002), rehearing den. 537 U.S. 1098, 123 S. Ct. 717, 154 L.Ed.2d 651 (2002). Since the Petitioner has failed to demonstrate that the Respondent or his attorneys have submitted false or forged documents, or that the Respondent or his attorneys have inserted bogus documents into the record, her Petition must fail; Hazel-Atlas Glass Co. v. Hartford Empire Co., 322 US 238, 64 S. Ct. 997, 88 L.Ed. 1250 (1944); overruled on other grounds, Standard Oil of Cal vs. United States, 429 US 17, 97 S. Ct. 31, 50 L.Ed. 2d 21 (1976); Oxxford Clothes XX, Inc. v. Expeditors International of Washington, Inc., 127 F.3d 574, 578 (7th Cir., 1997).

There has been no clear and convincing evidence presented, as required by the case law. Under these

circumstances, the Petition for Certiorari should be denied.

CONCLUSION

BASED UPON THE OUTSTANDING AND CONTROLLING LEGAL PRECEDENTS, THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

Dated: New York, New York
August 9, 2010

Respectfully submitted,

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